IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CHAD BURNS and DAVID TORRES, On Behalf of Themselves and all Others Similarly Situated,	§ § § §	
Plaintiffs,	§ §	
v.	§	CIVIL ACTION NO. 5:15-cv-01016-RCL
	§	
CHESAPEAKE ENERGY, INC., WILD PURGE I, LLC, and JOHN DOE DEFENDANTS 1 to 5,	§ § § §	
Defendants.	§	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL RECONSIDERATION

1. Chesapeake cannot waive Rule 23's requirements.

Throughout their Response, Plaintiffs urge that Chesapeake has waived various objections or challenges. This is unavailing. Even if the Court were to disregard Chesapeake's argument on any of these points, the Court has an independent obligation to engage in a "rigorous analysis" of Plaintiffs' Rule 23 obligations. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1429 (2013) ("Courts may have to probe behind the pleadings before coming to rest on the certification question, and a certification is proper only if the trial court is satisfied, after a rigorous analysis, that Rule 23's prerequisites have been satisfied." (internal citations omitted)); *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) ("[A] careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification.").

2. Plaintiffs have failed to sufficiently prove ascertainability because they have wholly failed to show how a class could be determined.

Plaintiffs misstate Chesapeake's argument on this point. Chesapeake is not claiming that certification is inappropriate because it may include a few members that did not experience a harm. Rather, Chesapeake's position is that Plaintiffs have wholly failed to describe how a class could be determined in this case *at all*. The only evidence offered by Plaintiffs in support of ascertainability is the Nohavitza E-mail. But the Nohavitza E-mail does not suggest that *anyone* experienced the harm Plaintiffs claim they experienced. Dkt. 48-1 ¶ 34, pp. 22-25. The Nohavitza E-mail indicates only that Wild Purge made *late* payments to other Wild Purge workers, not that it failed to pay them altogether. Plaintiffs have not offered any admissible evidence that there is any ascertainable class outside of Burns and Escalante or even a methodology for determining whether such a class exists. The proposed class is not ascertainable and Rule 23 class certification should be denied.

3. Plaintiffs have not established numerosity because they improperly rely on the Nohavitza E-mail to establish that others besides Burns and Escalante experienced a harm.

In support of numerosity, Plaintiffs again improperly rely on the Nohavitza E-mail for something it does not stand for. According to Plaintiffs, the class is numerous because the Nohavitza E-mail shows that there are a large number of people who experienced the same wage theft. But that misstates the Nohavitza E-mail. According to the Nohavitza E-mail, everyone was paid wages they were due if they had complied with the obligation to submit their invoices. Contrary to Plaintiffs' suggestion, this is actually evidence that the class is *not* numerous.

Plaintiffs also revert to statements by Burns and Escalante that they have *heard* from unnamed and un-counted co-workers that they also experienced wage theft. Dkt. 75 p. 8; Dkts. 48-1 at ¶ 34; 48-2 ¶ 32. Plaintiffs claim that this inadmissible hearsay not based on either's personal knowledge should nevertheless be considered by the Court because "the rules of evidence do not apply in full force." Dkt. 75 p. 8. This directly contradicts established Fifth Circuit precedent: "Like our brethren in the Third, Fourth, Seventh and Ninth Circuits, we hold that a careful certification inquiry is required and findings must be made based on adequate a*dmissible evidence to justify class certification*." *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) (emphasis added).[1] Plaintiffs' inadmissible hearsay statements are no evidence of numerosity.

Emblematic of Plaintiffs' failure to show numerosity is their *continued* failure—even today—to comply with the Court's Local Rule by neglecting to "include . . . [t]he anticipated number of class members and how this number was determined." W.D. Tex. Local Rules App'x A at ¶ (5)(a). Plaintiffs have not met their obligation as it relates to numerosity and Rule 23 class certification is improper.

4. Plaintiffs have not introduced admissible evidence of commonality.

Plaintiffs again misstate Chesapeake's argument on this point. Plaintiffs have not established commonality with sufficient admissible evidence to meet their "rigorous" burden because, as described above, their speculation and hearsay is insufficient and the misinterpreted Nohavitza E-mail simply does not say what they say it says.

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[1] Plaintiffs rely on *Willis v. Behar* for support. Dkt. 75 p.8. *Willis* noted that many district courts *outside* of the Fifth Circuit apply lax evidentiary standards but cited *Unger* and noted that it took a divergent view. *Willis v. Behar*, No. 4:13-cv-3375, 2015 WL 12942481 (S.D. Tex. Dec. 14, 2015) ("The Fifth Circuit has held that when conducting its rigorous analysis of whether a class should be certified, 'findings must be made based on adequate admissible evidence to justify class certification.' The Fifth Circuit also held that 'at the certification stage, reliance on unverifiable evidence is hardly better than relying on bare allegations.'" (*citing Unger*, 401 F.3d at 319)). The *Willis* court also stated, "[g]enerally, to satisfy the authentication requirement for an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what it is claimed to be. Allegations in a declaration that are not based on the personal knowledge of the declarant are incompetent evidence and should be stricken for lack of competence." *Willis*, 2015 WL 12942481 at *4.

Plaintiffs also put forward their novel claim that commonality is established *ipso facto* by the Court's default judgment against Wild Purge. Dkt. 75 p. 11. This contradicts the "rigorous" Rule 23 analysis required by the Court. Both the Fourth and Seventh Circuit have acknowledged the Court's independent Rule 23 obligations and rejected Plaintiffs' argument:

> [T]he Seventh Circuit—the only circuit to address the question of implicit certification in the context of a default judgment—refused to allow it. *See Hutchins*, 321 F.3d at 649. We agree with its reasoning that although a default judgment has the effect of deeming all factual allegations in the complaint admitted, it does not also have the effect of "admitting" the independent legal question of class certification. *See id.* at 648–49 ("Rule 23(c) imposes an independent duty on the district court to determine by order that the requirements of Rule 23(a) are met regardless of the defendant's admissions.").

Partington v. Am. Int'l Specialty Lines Ins. Co., 443 F.3d 334, 341 (4th Cir. 2006) (*citing Davis v. Hutchins*, 321 F.3d 641, 649 (7th Cir. 2003)). The default judgment has no impact on the Court's Rule 23 analysis and does not establish a "rule of the case."

5. Plaintiffs have not shown with competent evidence that common questions of law or fact predominate over individualized inquiries.

Plaintiffs correctly note that success on their *quantum meruit* claims requires that each class member provide that they "had a reasonable expectation to be paid by Chesapeake." Dkt. 75 at 12 (citing *In re Kellogg Brown & Roon, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005)). But the only evidence Plaintiffs offer on this point—the Nohavitza E-mail—shows that class members *did not comply* with Wild Purge's expectations. As Mr. Nohavitza put it, Wild Purge workers were missing some of the "paperwork" necessary for payment—direct deposit agreements and IRS Forms W-9. Dkt. 48-1 p. 24. For each Plaintiff, in addition to reviewing the direct deposit agreements and IRS Forms W-9, the Court would also have to review the invoices that each submitted for different periods of time and the evidence of funds that Wild Purge paid each individual Plaintiff. This requires an individualized inquiry by the Court for each Plaintiff. Stated differently, this is not an argument about the *amount* of damages but whether damages are due at all. Because Plaintiffs have offered no method of answering these questions with common proof, they have failed their obligation as it relates to predominance.

6. Plaintiffs have not offered evidence showing that a Rule 23 class is manageable.

Rather than using their Response as an opportunity to explain for the first time *how* this case could be managed as a Rule 23 class action, Plaintiffs revert to argument about the merits of Chesapeake's alleged joint employer status. And although this is a hotly contested issue, it is irrelevant at this stage. *In re Deepwater Horizon*, 739 F.3d 790, 798 (5th Cir. 2014) ("Importantly, Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." (citations omitted)). Instead, what matters is whether the Plaintiffs have produced any evidence of manageability; they conspicuously have not. Plaintiffs have not offered a method of identifying class members, establishing liability on a class wide basis, or of establishing class-wide damages. Simply, Plaintiffs have wholly failed to establish manageability.

CONCLUSION

Defendants request that the Court reconsider its Order recommending the certification of a Rule 23 class and recommend the denial of Plaintiffs' Motion for Rule 23 Class Certification.

Respectfully submitted,

/s/ Bruce A. Griggs

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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